

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the  
Involuntary Discharge of  
S M  
Petitioner, by  
St. Mark's Lutheran Home,  
Respondent.

FINDINGS OF FACT.  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on June 17, 1991, at St. Mark's Lutheran Home, Austin, Minnesota. The record closed on July 16, 1991, upon receipt of the final post-hearing submission.

Thomas J. Tait, Attorney at Law, Suite 201, 500 First Avenue Southwest, Rochester, Minnesota 55902, appeared on behalf of the Petitioner, S M . Fred W. Hellmann of Hoversten, Strom, Johnson & Rysavy, 807 West Oakland Avenue, Austin, Minnesota 55912, appeared on behalf of Respondent, St. Mark's Lutheran Home.

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Marlene Marschall, Minnesota Department of Health, 717 Delaware Street S.E., Minneapolis, Minnesota 55414, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Petitioner has failed, after reasonable and appropriate notice, to pay or to have Medical Assistance pay on her behalf for her stay at Respondent.

2. Whether nonpayment by Petitioner for her stay is justified and excused by a claim by Petitioner of malpractice on the part of Respondent.

Based upon the record herein, the Administrative Law Judge makes the following: ,

## FINDINGS OF FACT

1. Petitioner is an elderly woman presently residing at Respondent's nursing home (St. Mark's) in Austin, Minnesota. She has resided there since December 27, 1990, except for an eleven-day hospital stay from January 11 to January 21, 1991.

2. Since 1982, Petitioner's granddaughter, A Q had handled Petitioner's personal affairs, paying her bills, buying her groceries and clothes and the like. On September 14, 1982, Petitioner executed identical durable general powers of attorney appointing A Q and her husband, R Q as her powers of attorney. Respondent's Ex. 3.

3. For the three or four years prior to her admission to St. Mark's, Petitioner had resided with the Qs in Austin. She had a room of her own that had a bed and a separate living area. The Qs also have three children at home. R is a letter carrier and A works part-time.

4. While living with the Qs, Petitioner attended adult day care at Sacred Heart Hospice in Austin. One day in December 1990, Petitioner fell while at the Q's home and fractured her hip. The Qs or Petitioner have filed a claim against Sacred Heart Hospice alleging that Petitioner was injured as a result of the negligence of Sacred Heart in leaving her at the Q home when no one was there.

5. On December 27, 1990, Petitioner was admitted to St. Mark's for the purpose of receiving care while she recovered from the hip fracture. The Admission Agreement between St. Mark's and Petitioner was signed that day on behalf of Petitioner by A Q, acting as Petitioner's attorney in fact. Respondent's Ex. 2. A Q did not sign the Admission Agreement as a responsible party. The Admission Agreement contains the following relevant provisions:

1.1 Services included in the daily room rate. The Facility shall provide the Resident with nursing care at the level of care assigned in accordance with the rules of the Minnesota Department of Health (see Section 1.3 below). The Facility shall also provide room, board, personal and custodial care, major housekeeping services, social services, and such other services as may be required by law. The daily room rate, discussed in Section 2.1.1, shall include all such services as set forth in this section.

2.1.1 Daily room rate. The Resident and the Responsible Party shall cause the Facility to be paid 170.62 Dollars (\$70.62) per day, payable one month in advance, by the 10th day of the month. This daily room rate is due whenever a room is used by or reserved for the Resident as permitted by law, even when the Resident is absent for any reason, including hospitalization. The initial daily room rate is based on the estimated initial resident classification discussed in section 1 .3 of this

Agreement. This estimated daily room rate may be adjusted, retroactive to the date of admission, when official notification of the Resident's classification is received.

2.1.5 Application for-Medical Assistance\_ an The Resident and the Responsible Party shall notify the Facility when the Resident's private funds are reduced to Six Thousand Dollars (\$6,000), if the Resident is single, or Eighteen Thousand Dollars (\$18,000) if the Resident is married. The Resident and the Responsible Party shall then apply for Medical Assistance pursuant to Section 2.2 of this Agreement and shall keep the Facility informed as to the status of the application. While the application is pending and after it has been approved or disapproved, the Resident and the Responsible Party shall cause all lawful charges of the Facility to be paid according to Section 2.2 of this Agreement.

2.2 Eligibility-for and Receipt of Medical Assistance-Medicare. or other insurance benefits. If the Resident is a recipient of Medical Assistance, Medicare, or other insurance benefits at the time of admission or becomes eligible for or begins to receive such benefits after admission, the Resident and the Responsible Party, if any, shall be jointly and severally responsible as follows:

2.2.1 Application for Medical Assistance, Medicare, or other insurance benefits. The Resident and the Responsible Party shall promptly complete and file all Medical Assistance, Medicare, and/or other insurance benefit application forms and/or claim forms when appropriate. They shall promptly notify the Facility of any delay or difficulties in the application and/or claim process. Until the Resident's application or claim for Medical Assistance, Medicare, or other insurance benefits is approved, the Resident and the Responsible Party shall cause the daily room rate as set forth in Section 2.1.1 of this Agreement relating to private pay residents to be paid to the Facility.

Upon presentation of proof of eligibility, the Facility may submit a Medical Assistance, Medicare, or other insurance benefits claim for reimbursement and will return any and all payment made by the Resident, or by any person on the Resident's behalf, for services covered by Medical Assistance, Medicare, or other insurance benefits, upon receipt of Medical Assistance, Medicare, or other insurance payment.

2.2.2 Charges Not Covered by Medical Assistance. The Resident and the Responsible Party shall promptly cause the Facility to be paid for all lawful charges insofar as



Medical Assistance does not meet the daily room rate and other lawful charges of the Facility, as directed by a welfare agency.

### III. PAYMENT FOR OTHER CHARGES AND COSTS

The Resident and the Responsible Party, if any, shall cause all charges for any services that are not included in the daily room rate to be paid to the Facility to the extent such charges are not covered by another payment source. Payments for these charges shall be due within ten (10) days of receipt of all billings for such charges. The Resident and the Responsible Party, if any, shall also cause the Facility to be paid for any collection costs on past due amounts payable pursuant to this Agreement, including reasonable attorneys' fees and a late charge of 10 percent annual interest on such amounts.

### IX. CERTIFICATIONS

The Resident and Responsible Party, by signing this Agreement certified that:

9.1 They have read and do understand this entire Agreement.

9.2 They each agree to be jointly and individually responsible for performing the duties and obligations of the Resident under this Agreement.

9.3 They have been fully informed of their rights and of the procedures for filing complaints without fear of reprisal with the Office of Health Facility Complaints, the Minnesota Department of Health, the area nursing home ombudsman, and the Facility's administrator. They have received the address and telephone numbers of the Office of Health Facility Complaints and the area nursing home ombudsman.

6. It was A Q 's hope and goal that Petitioner would be back home with her in thirty days. In her opinion, Petitioner was improving during her stay at St. Mark's and had started walking and putting on her own makeup and jewelry as she improved.

7. On January 11, 1991, Petitioner fell while at St. Mark's, refracturing her hip. The Q s assert that Petitioner's fall and injury were the result of Respondent's negligence. Respondent asserts that there are several possible defenses and denies that it was negligent. No law suit has yet been commenced but Mr. Tait has been retained by the Q s to handle the claim against Respondent as well as the claim against Sacred Heart

Hospice.



8. Medicare paid for Petitioner's stay at St. Mark's from December 27, 1990 through January 10, 1991, and again for January 11, 1991 through January 21, 1991. St. Mark's has not charged Petitioner for the eleven days she was in the hospital. Medicare has also paid the charges over the co-insurance amount of \$78.50 per day for the period of January 27, 1991 to January 31, 1991, and February 14, 1991 to March 19, 1991.

9. Since January 27, 1991, Petitioner has incurred the following charges at St. Mark's, exclusive of the charges that have been paid by Medicare:

Service Dates	Description	Day Count	Charge
1/27-1/31/91	Medicare Co-Ins. at \$78.50	5	\$ 392.50
2/1-2/13/91	K-Private Pay at \$92.76	13	1,205.88
2/14-2/28/91	Medicare Co-Ins. at \$78.50	15	1,177.50
2/31-3/19/91	Medicare Co-Ins. at \$78.50	19	1,491.50
3/20-3/31/91	K-Private Pay at \$92.76	12	1,113.12
4/1-4/30/91	K-Private Pay at \$92.76	30	2,782.80
5/1-5/31/91	G-Private Pay at \$70.62	31	2,189.22
6/1-6/30/91	G-Private Pay at \$70.62	30	2,118.60
TOTAL			\$12,471.12

In addition thereto, interest on the unpaid balance as allowed by the Admission Agreement is owed.

10. Petitioner has not paid any of the foregoing charges. The Q's have refused to pay any of the charges on Petitioner's behalf out of Petitioner's funds and have refused to apply for Medical Assistance on her behalf. Petitioner has very limited assets available and would very likely be eligible for Medical Assistance within a month or two of paying the nursing home charges privately. St. Mark's has provided instructions to the Q's on the application procedure for Medical Assistance.

11. The Q's refuse to allow Petitioner to pay for St. Mark's charges or to apply for Medical Assistance because they believe that Respondent is responsible for Petitioner's extended stay at St. Mark's and should take care of her without charge. They also believe that it is morally wrong for Medical Assistance to pay the bill. R Q is aware that if Medical Assistance pays for Petitioner's care and Petitioner is ultimately successful

in a law suit against Respondent, Medical Assistance will be reimbursed out of any settlement or award.

12. By letter of April 3, 1991, addressed to the Q s, Respondent notified the Q s of its intent to discharge Petitioner on May 3, 1991, because the charges for January 27, 1991 through March 31, 1991, had not been paid. The notice stated that the discharge could be appealed to the state of Minnesota and gave the address of the Department of Health for the purpose of filing an appeal. Copies of the letter were sent to Petitioner's attorney, Mr. Tait, and to "Ombudsman-Gordon Patterson." The notice did not contain the mailing address and telephone number of the ombudsman. On April 29, 1991, Mr. Tait, on behalf of Petitioner, appealed the discharge and requested a hearing in the matter. On May 3, 1991, the acting Commissioner of Health

issued a Notice of and Order for Hearing, setting the hearing in this matter for June 17, 1991.

13. After the April 3, 1991, Notice of Discharge had been sent to the and their attorney, the Director of Social Services at St. Mark's called other nursing homes in the Austin area to determine the availability of beds for Petitioner, In a letter of April 17, 1991, the Director of Social Services informed the Q s of the available openings. Copies of the letter were provided to Petitioner's attorney and to the area ombudsman, The Q s have refused to cooperate in arranging for Petitioner s discharge from St. Mark's

14. Other than the fact that they feel St. Mark's was negligent in not preventing the accident that caused Petitioner to be reinjured, the Q s are generally satisfied with the services and facilities provided by St. Mark's.

15. Petitioner attended the hearing. With the consent of her attorney and the Q s, she left the hearing to eat lunch. She did not testify at the hearing.

16. Gordon Patterson, the long-term care ombudsman for ten counties in the Austin area, attended the hearing at the request of Petitioner's attorney.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Commissioner of Health and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 14.50, and 18.19(c)(2), 18.19(e)(3), 19.19(c)(2) and 19.19(e)(3) of the Social Security Act.

2. The Notice of and Order for Hearing issued by the Department in this matter was proper and all relevant, substantive and procedural requirements of law or rule have been fulfilled.

3. Petitioner appealed the Notice of Discharge in a timely and proper manner.

4. Pursuant to 18.19(c)(2)(B) and 19.19(c)(2)(B), before effecting a discharge of a resident, a nursing facility must notify the resident and an immediate family member of the discharge and the reasons thereof or at least thirty days in advance of the resident's discharge, and must include notice of the resident's right to appeal and the name, mailing address and telephone number of the state long-term care ombudsman.

5. The failure of Respondent to state the ombudsman's mailing address and telephone number in the Notice of Discharge was not prejudicial to Petitioner. Petitioner and A Q had received the address and telephone number of the area nursing home ombudsman at the time of Petitioner's admission to St. Mark's and so certified in the Admission Agreement. Petitioner's attorney contacted the ombudsman prior to the hearing to obtain whatever assistance could be provided. Therefore, the failure to fully

identify the ombudsman and the Notice of Discharge did not render the notice defective

6. Pursuant to 19.19(c)(2)(A) of the Social Security Act, a skilled nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless --

(v) The resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this title or Title XVIII on the resident's behalf) for a stay at the facility;

For purposes of clause (v), in the case of a resident who becomes eligible for assistance under this title after admission to the facility, only charges which may be imposed under this title shall be considered to be allowable.

7. Under Minn. Rule 1400.7300, subp. 5, the party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless a substantive law provides a different burden or standard. Thus, the burden is upon Respondent to demonstrate that Petitioner has failed to pay after reasonable and appropriate notice. The rule also provides that a party asserting an affirmative defense has the burden of proving the existence of the defense, thus the burden is upon Petitioner to demonstrate the facts at issue regarding its claim of justification.

8. Petitioner has failed, after reasonable and appropriate notice, to pay for her stay at the facility and has failed to apply for Medical Assistance so that her stay might be paid for under Title XIX of the Social Security Act.

9. Petitioner's claim of malpractice against Respondent is a matter to be determined and litigated in a different forum and does not constitute justification or excuse for nonpayment for the stay.

10. Petitioner may be discharged under the terms of 19.19(c)(2)(A) of the Social Security Act.

11. Exhibits I through 5 attached to Petitioner's brief have been objected to by Respondent as untimely. Being that they are documents prepared by Respondent or by the Department of Health, the documents appear to be reliable and trustworthy as to what they purport to state and have, therefore, been received into the record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the commissioner of Health deny Petitioner's appeal and allow her proposed discharge.

Dated this 1st day of August 1991 .

STEVE M. MIHALCHICK  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail

Reported: Taped, not transcribed. Tape numbers 6537 and 3095.

#### MEMORANDUM

There is no dispute as to the material facts in this case: the Q s admit that they have refused to pay Respondent's charges and have refused to apply for Medical Assistance on behalf of Petitioner. The Q s handle all of Petitioner's affairs so, in effect, Petitioner has refused to pay the charges or apply for Medical Assistance. The Q s claim they are justified in not paying the charges and that Respondent should provide free care to Petitioner because they believe Respondent, through its negligence, caused Petitioner to fall and refracture her hip, thereby extending her stay at the nursing home.

Petitioner argues that nursing home residents should be accorded the same type of defenses that are accorded residential tenants in this state. Petitioner cites a decision of the Commissioner of Health that landlord-tenant law is analogous to nursing home discharge cases. In In the Matter of the Involuntary Discharge of M E , Petitioner, by Nile Health\_CAre Center. Respondent, Commissioner of Health Order March 25, 1991, in discussing the burden of proof issue, the Commissioner stated:

In this proceeding, M E is merely trying to maintain the status quo; her continued residence in the Nile Health Care Center. The facility is proposing to evict her from the premises. In landlord-tenant law, which is analogous, the landlord is required to take legal action and bear the burden of proving that the tenant is not entitled to continued possession of the premises. I see no reason why the nursing home resident should be

afforded less of an advantage with respect to the allocation of the burden of proof.



petitioner claims that the facts in this matter are analogous to the facts in the landlord-tenant case of Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973). In that case, the tenants alleged repair and maintenance problems with their apartment which interfered with their enjoyment of the premises. They gave notice of the defects to the landlord and when no repairs were made, withheld \$35.00 of the rent due one month. The Minnesota Supreme Court held that the statutory covenant of-habitability imposed on leases of residential premises by Minn. Stat. 504.18 and the covenant of a tenant to pay rent were mutually dependent rather than independent and that a failure by the landlord to provide habitable premises could thus be asserted as a defense in an unlawful detainer action under Minn. Stat. 566.03. The court also held that where there was a fact question regarding the defenses asserted by a tenant, the tenant must be required to pay the rent to be withheld from the landlord into court until final resolution on the merits or that other appropriate security be established.

are not withholding payment to force compliance with habitability or health and safety requirements, they are seeking damages for a personal injury that may have been caused by the negligence of St. Mark's. Petitioner's claim for damages simply has no relationship to the charges made by St. Mark's for providing room, board and care to Petitioner in the way that a tenant's right to habitable premises relates to rent charged under a residential lease.

Finally, even if Fritz v. Warthen applied, Petitioner could not simply stop paying pending resolution of her negligence claim. Arrangements would have to be made to provide for appropriate security of the payments pending resolution of the claim. In this case, that can best be done by requiring Petitioner to pay her bill and to apply for Medical Assistance. If Petitioner ultimately prevails on her negligence claim against Respondent, she will receive an award for damages, which might include charges she has paid to Respondent. Due to her lack of resources, that amount will be relatively small. If Medical Assistance has paid the charges, it would be entitled to be reimbursed out of such an award and may easily collect from other payments it makes to Respondent. On the other hand, if Petitioner's action against Respondent is unsuccessful, and neither Petitioner nor Medical Assistance have paid the charges in the meantime, Respondent will have little hope of collecting. Petitioner has limited funds and, under Minn. Rule 9505.011, retroactive eligibility for Medical Assistance is limited to three calendar

months before the month of application. So Petitioner will have little ability to pay the bill and Medical Assistance will have no liability to do so, The Q s have no direct liability because they have been acting as Petitioner's powers of attorney and have no personal liability to Respondent for Petitioner's care under the terms of the Admission Agreement. They may be liable to St. Mark's because of their actions in this matter, but they don't seem to be people of unlimited means. The Q s have not offered to pay the charges into escrow and in the case of the Medical Assistance, they could not, because they have no standing to assert claims for the Department of Human Services. Instead, they demand that Respondent provide free care. Such an arrangement is not allowed even under Fritz v. Warthen.

Petitioner also argues that St. Mark's has failed to comply with federal requirements requiring sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This argument has no merit. Petitioner, through the Q s, has refused to cooperate in planning her discharge. She has refused to pay the bill and at the same time refused to move. She can hardly be heard to complain that St. Mark's has not done appropriate discharge planning. The record indicates that St. Mark's has attempted to initiate that process, but has been rebuffed by the Q s. The Administrative Law Judge and the Commissioner can take administrative notice of the stress created on elderly residents when they are moved from one location to another and which has been called "transfer trauma." If Petitioner and the Q, s refuse to pay St. Mark's charges and refuse to apply for Medical Assistance on Petitioner's behalf, then it is they who have chosen to leave the facility. All parties must cooperate in the discharge planning to reduce transfer trauma for the Petitioner to the extent possible, and the failure of Petitioner and the Q s to do so cannot prevent the discharge. Nursing homes are allowed to discharge residents if they don't pay for their stay. Petitioner has not paid and may be discharged.

SMM